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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
8 FOR KING COUNTY

9 CITY OF SEATTLE, SEATTLE POLICE
10 DEPARTMENT,

11 Petitioner,

12 vs.

13 SEATTLE POLICE OFFICERS' GUILD,
14 ARBITRATOR JANE WILKINSON and
ADLEY SHEPHERD

15 Respondents.

No. 18-2-57201-1 SEA

ORDER GRANTING PETITIONER'S
MOTION TO VACATE ARBITRATOR'S
AWARD AND RESPONDENT'S MOTION
TO STRIKE

16 THIS MATTER comes before the Court on Petitioner's Motion to Vacate
17 Arbitrator's Award. The following has been submitted to the Court for its consideration:

- 18 1. Petitioner's Motion to Vacate Arbitrator's Award;
19 2. Declaration of Sarah Tilstra and the exhibits attached thereto;
20 3. Respondent SPOG's Motion to Strike and Trial Brief;
21 4. Declaration of Hillary McClure and the exhibits attached thereto; and
22 5. Petitioner's Reply on Motion to Vacate Arbitrator's Award and Response
23 to SPOG's Motion to Strike.

1 After considering the above referenced briefing and after extensive and
2 informative oral argument on August 12, 2019, the Court enters the following Order.

3 **I. Introduction**

4 The matter before the Court is extraordinary. It is extraordinary in that we have
5 graphic video of the excessive force at issue that was determined by the Disciplinary
6 Review Board to have been used. Seattle Police Department patrol car video from the
7 night of June 22, 2014, shows a handcuffed Miyekko "Coco" Durden-Bosley kick Officer
8 Adley Shepherd in the jaw from the back seat of his patrol car and then shows Officer
9 Shepherd respond with a punch to her right eye approximately two seconds later after
10 he initially stepped back from the open patrol car back door. This video shows the force
11 of the blow and its immediate impact on the behavior of Ms. Durden-Bosley. Video from
12 a second patrol car shows the physical impact of the punch, as Ms. Durden-Bosley was
13 left with a bleeding and swelling right eye.

14 The matter is also extraordinary procedurally in that courts do not typically review
15 arbitration awards that are agreed to be final and binding per the terms of collective
16 bargaining agreements. The Court recognizes case law that correctly states that
17 extensive judicial review of arbitration awards would weaken the value of bargained for
18 binding arbitration and could damage the overall freedom to contract. However, judicial
19 review of an arbitration award is permissible to determine if the arbitration award is
20 contrary to public policy. Arbitration awards may be overturned, if they are contrary to
21 explicit, dominant and well-defined public policies. *International Union of Operating*
22 *Engineers, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 295 P.3d 736 (2013) citing
23

1 *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675
2 (2009).

3 The City of Seattle alleges that the discipline imposed as part of the Disciplinary
4 Review Board arbitration decision of November 19, 2018, which allowed Officer
5 Shepherd to be reinstated as a police officer without patrol or training duties with full
6 back pay (not including overtime compensation), less 15 days pay for the suspension,
7 and less all interim earnings and compensation is so lenient that it violates the public
8 policy against the use of excessive force in policing. In addressing this allegation, the
9 Court is required to accept the Disciplinary Review Board's findings of fact as to the
10 violation of the SPD policy and as to findings about the impact that the discipline
11 imposed may have on Officer Shepherd.

12 The Court first considers whether the public policy at issue is explicit, dominant
13 and well-defined. If the Court makes such a finding, it must then determine whether the
14 Disciplinary Review Board's decision as to imposed discipline violates the referenced
15 public policy. While the Court accepts the arbitrator's findings of fact, it should be clear
16 that the Court also considered the entire record provided, including repeated viewing of
17 videos from the incident scene in order to reach its decision as to the adequacy of
18 discipline imposed. It should also be clear that the Court is not considering whether
19 Officer Shepherd's behavior violates public policy, but instead only whether the
20 Disciplinary Review Board's imposed discipline violates public policy that is explicit,
21 dominant and well-defined.

1 **II. The public policy prohibiting excessive force in policing is explicit,**
2 **dominant and well defined.**

3 **A. The public policy against excessive force in policing is explicit.**

4 It is undisputed that there is a public policy against the excessive use of force in
5 policing. Per *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1864, 104 L.Ed.2d
6 443(1989), the excessive use of force by police officers in effecting an arrest violates
7 the Fourth Amendment to the United States Constitution. As the City notes, subsequent
8 cases including *Palmer v. Sanderson*, 9 F.3d 1433, (9th Cir. 1993) and *Staats v. Brown*,
9 139 Wn.2d757, 991, P.2d 515 (2000), affirm this policy. In *Staats*, our Washington
10 State Supreme Court specifically found that Mr. Staats' right to be free from arrest with
11 excessive force was clearly established for purposes of determining whether the
12 alleged, offending officer was entitled to qualified immunity. In light of the protective
13 language in the Fourth Amendment to the U.S. Constitution and cases interpreting it,
14 this Court finds that there is an explicit public policy against the use of excessive force
15 in policing.

16 **B. The public policy against the use of excessive force in policing is**
17 **dominant.**

18 As noted above, the public policy against the use of excessive force in policing is
19 rooted in the Fourth Amendment to the U.S. Constitution. Similar to the Washington
20 State Supreme Court's determination in *International Union of Operating Engineers,*
21 *Local 286 v. Port of Seattle*, 176 Wn.2d 712, 295 P.3d 736 (2013) that the public policy
22 against discrimination in the workplace was dominant because the Washington Law
23 Against Discrimination expressed a public policy "of the highest priority," the Fourth
24 Amendment prohibition against the use of force as interpreted in case law is also a

1 policy of the highest priority and is therefore, dominant. Prevention of physical injury
2 from the use of excessive force by law enforcement officers is clearly a dominant public
3 policy concern.

4 **C. The public policy against the use of excessive force in policing is**
5 **well-defined.**

6 Contrary to the argument of the Seattle Police Officer's Guild, the Court does not
7 find that well-defined public policy necessarily requires a specific discipline or
8 punishment component. Relevant statutes arising from the Fourth Amendment to the
9 United States Constitution create an affirmative duty to prevent the use of excessive
10 force in policing. The Fourth Amendment states:

11 The right of the people to be secure in their persons, houses, papers, and
12 effects, against unreasonable searches and seizures, shall not be
13 violated, and no warrants shall issue, but upon probable cause, supported
14 by oath or affirmation, and particularly describing the place to be
15 searched, and the persons or things to be seized.

16 Violation of the Fourth Amendment through unreasonable seizure attributable to
17 use of excessive force is actionable by citizens against police officers and their
18 employers under 42 U.S.C. Section 1983 which provides:

19 Every person who, under color of any statute, ordinance, regulation,
20 custom, or usage, of any State or Territory or the District of Columbia,
21 subjects, or causes to be subjected, any citizen of the United States or
22 other person within the jurisdiction thereof to the deprivation of any rights,
23 privileges, or immunities secured by the Constitution and laws, shall be
liable to the party injured in an action at law, suit in equity, or other proper
proceeding for redress, except that in any action brought against a judicial
officer for an act or omission taken in such officer's judicial capacity,
injunctive relief shall not be granted unless a declaratory decree was
violated or declaratory relief was unavailable. For the purposes of this
section, any Act of Congress applicable exclusively to the District of
Columbia shall be considered to be a statute of the District of Columbia.

1 Additionally, the Violent Crime Control and Law Enforcement Act of 1994 at 34
2 U.S.C. Section 12601 provides a mechanism for enforcement of the policy against the
3 use of excessive force in policing. This mechanism for addressing violations of the
4 Fourth Amendment allows the Office of the Attorney General of the United States to
5 pursue appropriate equitable and declaratory relief to eliminate patterns or practices of
6 law enforcement deprivation of Constitutional rights. RCW 34 U.S. Code § 12601
7 provides as follows:

8 (a) Unlawful conduct

9 It shall be unlawful for any governmental authority, or any agent thereof, or
10 any person acting on behalf of a governmental authority, to engage in a
11 pattern or practice of conduct by law enforcement officers or by officials or
12 employees of any governmental agency with responsibility for the
13 administration of juvenile justice or the incarceration of juveniles that
14 deprives persons of rights, privileges, or immunities secured or protected
15 by the Constitution or laws of the United States.

16 (b) Civil action by Attorney General

17 Whenever the Attorney General has reasonable cause to believe that a
18 violation of paragraph (1) has occurred, the Attorney General, for or in the
19 name of the United States may in a civil action obtain appropriate
20 equitable and declaratory relief to eliminate the pattern or practice.

21 These Federal statutes and case law previously referenced interpreting Fourth
22 Amendment applicability demonstrate that the public policy against the use of excessive
23 force while policing is indeed, explicit, dominant and well-defined.

24 Furthermore, Paragraph 70(f) of the Consent Decree entered between the City of
25 Seattle and the U.S. Department of Justice on July 27, 2012 and Section 8.100(2) of the
26 Seattle Police Department Manual, which addresses use of force against handcuffed
27 individuals, support finding that the policy against the use of excessive force in policing

1 is explicit, dominant and well-defined. Paragraph 7(f) of the Consent Decree provides
2 as follows:

3 Officers normally should not use reportable force against handcuffed or
4 otherwise restrained subjects unless necessary or reasonable under the
5 circumstances to stop an assault, escape, or as necessary to fulfill other
6 legitimate law enforcement objectives, and

7 the Seattle Police Department Manual at Section 8.100(2), provides, at relevant part, as
8 follows:

9 An Officer may not use physical force:

10 To punish or retaliate

11 On handcuffed or otherwise restrained subjects except in exceptional
12 circumstances when the subject's actions must be immediately stopped to
13 prevent injury, escape, or destruction of property.

14 Use-of-force on restrained subjects shall be closely and critically reviewed.
15 Officers must articulate both: the exceptional circumstances, and
16 why no reasonably effective alternative to the use-of-force appeared to
17 exist.

18 **III. The Disciplinary Review Board's imposed sanction is so lenient that it**
19 **violates the explicit, dominant and well-defined public policy against the**
20 **use of excessive force in policing.**

21 As noted previously, the Court is bound by factual findings of the Disciplinary
22 Review Board with regard to the determination that Officer Shepherd violated the
23 provision set forth in the SPD Manual at Section 8.100(2). The Court is also bound by
the Board's findings as to the impact the imposed discipline would have on Officer
Shepherd, as the Board found that

[A]n honest, but mistaken belief that he was following SPD policy does not
mean that Officer Shepherd is incapable of changing his behavior. There
is no reason to believe that Officer Shepherd does not respect SPD policy,
and it is quite possible, if not probable that a lengthy suspension will tell

1 him that he always has to think about and utilize options that involve the
2 least amount of appropriate force under the circumstances.

3 Despite this finding with regard to impact on Officer Shepherd, this Court is
4 concerned about the impact a 15-day unpaid suspension with accompanying patrol and
5 training responsibility losses will have in maintaining Seattle Police Department
6 compliance with the explicit, dominant and well-founded public policy against the use of
7 excessive force in policing. This concern is bolstered by the Board's reference on page
8 23 of its Opinion and Award that it found as mitigating factors that Officer Shepherd's
9 "patience was being tried" and that he, "feeling stinging pain" "perhaps, reflexively, used
10 force." These listed mitigating factors appear to condone the use of force when dealing
11 with difficult subjects when it is universally understood that a significant part of the job of
12 the patrol officer is dealing with difficult subjects and doing so with patience.

13 Per the Court's reading of applicable provisions in the SPD manual, a Seattle
14 Police Officer cannot reflexively use force because of pain felt unless the individual
15 causing pain is still acting in some way to continue to inflict pain such that she or he
16 needs to be stopped in order to prevent injury or the continued infliction of pain. Police
17 officers are prohibited from using physical force to punish or retaliate and per the
18 provision of the SPD Manual that Officer Shepherd was found to have violated, Section
19 8.100(2), officers may only use force on handcuffed individuals in exceptional
20 circumstances when the subject's actions must be immediately stopped to prevent
21 injury, escape or destruction of property. When this force is used officers must
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1 articulate the exceptional circumstances and why no reasonably effective alternative
2 existed.¹

3 Repeated review of the video and the Board's Findings and Award document an
4 approximate two second period between Ms. Durden-Bosley's kick to Officer
5 Shepherd's jaw when he stepped back out of the car door area, perhaps to gain his
6 balance, and exclaimed "she kicked me" before he re-entered the back seat area with
7 his body and threw the punch that cut Ms. Durden-Bosley in the area of her right eye
8 and caused minimally displaced orbital wall and orbital floor fractures. It is precisely
9 the Board's finding that the punch may have been a reflexive response to pain that
10 leads this Court to find that the imposed sanction is so lenient that it violates the explicit,
11 dominant and well-defined public policy against the use of excessive force in policing.

12 The discipline imposed serves to condone retaliatory action in the form of
13 excessive force in violation of the Fourth Amendment to the U.S. Constitution rather
14 than to facilitate compliance with the explicit, dominant and well-defined public policy
15 against the use of excessive force in policing. Allowing this imposed discipline to stand,
16 which includes reinstatement of Officer Shepherd, sends a message to law enforcement
17 officers and to the public that the use of excessive force on handcuffed or restrained
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19 ¹ An appropriate example of use of force on a handcuffed suspect was provided in the record in a
20 video provided as City Exhibit 92 with an accompanying Office of Police Accountability finding provided
21 as Guild Exhibit 14. The Exhibit 92 video shows an arresting officer working with another officer to place
22 an uncooperative and challenging domestic violence suspect in the rear of a patrol car. As the arresting
23 officer attempted to secure the suspect with his arm up near the suspect's face, the suspect bit him on the
arm. The arresting officer promptly pulled his arm out of the suspect's teeth and continued to secure the
suspect. However, the suspect lifted his head with an open mouth to bite again. In response, the officer
struck the suspect in the head to prevent injury. This conduct fits within the scope of appropriate use of
force to prevent injury and is within the bounds of the public policy against the use of excessive force in
policing.

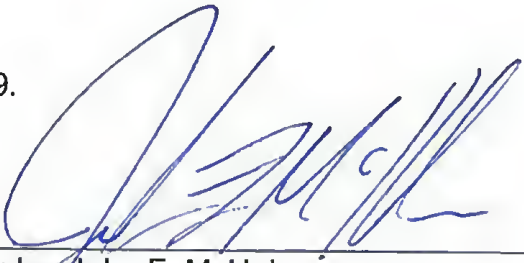
1 persons is allowed in situations when officer patience is stretched thin or when an
2 officer feels stinging pain inflicted by a handcuffed suspect who is no longer threatening
3 immediate harm or when there are other options for control available.

4 Based on the above, the Court orders as follows:

5 (1) Respondent SPOG's Motion to Strike is **GRANTED** as to consideration of
6 statements made by Officer Shepherd after the Disciplinary Board decision
7 was issued; and

8 (2) Petitioner, City of Seattle's Motion to vacate is **GRANTED**.

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10 DATED this 16th day of August 2019.

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13 Judge John F. McHale
14 King County Superior Court
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